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In the

Supreme Court of the United States

OCTOBER TERM, 1980

AMERICAN MEDICAL ASSOCIATION,
CONNECTICUT STATE MEDICAL SOCIETY,
and NEW HAVEN COUNTY MEDICAL
ASSOCIATION, INC.,

Petitioners,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

BRIEF AMICUS CURIAE OF THE AMERICAN DENTAL ASSOCIATION IN SUPPORT OF THE JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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I.

STATEMENT OF INTEREST AND STATEMENT OF THE CASE

This Amicus Brief is being filed by consent of the parties.[1]

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[1] Appendix (hereinafter App.) 1a-3a contains the parties' consent.

The American Dental Association, an Illinois not-for-profit corporation, is a voluntary dental association with approximately 119,000 fully privileged members, all of whom are dentists licensed to practice in the various states of the United States, the District of Columbia, the Commonwealth of Puerto Rico or a dependency of the United States.

The American Dental Association's interest in connection with the Joint Petition For A Writ Of Certiorari is limited to the question of the jurisdiction of the Federal Trade Commission Act over not-for-profit corporations.

This jurisdictional issue has not ever been resolved by this Court since the passage of the Act in 1914 and obviously requires a construction of the language of the Act that Congress used to confer jurisdiction to the Federal Trade Commission over some but not all corporations.

Simply stated, the Federal Trade Commission Act has jurisdiction only over "persons, partnerships or corporations" as those terms are defined by the Act. A "corporation" is defined as it is relevant to the Petition For Certiorari as an "association . . . which is organized to carry on business for its own profit or that of its members" (15 U.S.C. §§44, 45 (1979)).

Since Section 5 of the Act confers broad powers on the Federal Trade Commission, a national professional association such as the American Dental Association has an important interest in the question of whether the Federal Trade Commission's authority extends to traditional not-for-profit associations. In addition, the ultimate disposition of the Federal Trade Commission's complaint against the American Dental Association, Federal Trade Commission Docket No. 9093, is dependent upon this Court's

disposition of the instant Petition. By virtue of the Agreement Containing Consent Order to Cease and Desist,[2] entered into between the American Dental Association and the Federal Trade Commission, the Federal Trade Commission will issue an order against the American Dental Association which will be identical to the final adjudicated order which is entered against the American Medical Association in this action, insofar as the latter relates to advertising by physicians.

It was further agreed between the American Dental Association and the Federal Trade Commission that in the event the final adjudicated order in the American Medical Association case dismisses the complaint against the American Medical Association on the merits or for lack of jurisdiction, the Federal Trade Commission shall similarly dismiss its complaint against the American Dental Association. Thus, the determination of the jurisdictional issue is obviously of vital importance to the American Dental Association.

The American Dental Association respectfully submits this Brief Amicus Curiae in support of the Joint Petition For A Writ Of Certiorari To The Second Circuit Court of Appeals.

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[2] The relevant portions of said Agreement appear at App. 4a-5a.

ARGUMENT

II.

A. There Is A Conflict Among The Circuit Courts of Appeals As To The Test To Be Applied To Determine The Federal Trade Commission's Jurisdiction Over Not-For-Profit Corporations.

The decision of the Second Circuit Court of Appeals in this case, *American Medical Ass'n* v. *Federal Trade Comm'n*, 1980-2 Trade Cas. ¶63,569 (2d Cir. 1980), is in direct conflict with the test enunciated by the Eighth Circuit in *Community Blood Bank of Kansas City Area, Inc.* v. *Federal Trade Comm'n*, 405 F.2d 1011 (8th Cir. 1969), with respect to the Federal Trade Commission's jurisdiction over non-profit professional associations, pursuant to Sections 4 and 5 of the Federal Trade Commission Act (15 U.S.C. §§44, 45 (1979)).

Section 5(a)(2) of the Federal Trade Commission Act provides in pertinent part:

> "The Commission is empowered and directed to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce."

Accordingly, the Federal Trade Commission has jurisdiction only over "persons, partnerships, or corporations." A corporation is defined in Section 4 of the Federal Trade Commission Act to include only the following entities:

> "any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, which

> is organized to carry on business for its own profit or that of its members, and has shares of capital or capital stock or certificates of interest, and any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, without shares of capital or capital stock or certificates of interest, which is organized to carry on business for its own profit or that of its members."

The single question of statutory construction which this Court must resolve in order to define the scope of the Federal Trade Commission's jurisdiction is whether non-stock, not-for-profit professional associations, such as the American Medical Association and the American Dental Association, are corporations which are "organized to carry on business for [their] own profit or that of [their] members."

In *Community Blood Bank of Kansas City Area, Inc.* v. *Federal Trade Comm'n*, 405 F.2d 1011 (8th Cir. 1969), the Commission brought an action against two non-profit corporations: Community Blood Bank of Kansas City Area, Inc., a bloodbank; and Area Hospital Association, a Missouri not-for-profit corporation composed of hospitals and their administrators which was used by its members to collect information and to serve as a forum for the discussion of hospital problems (405 F.2d at 1013). Both corporations argued that they were not subject to the Federal Trade Commission's jurisdiction because they were not "organized to carry on business for [their] own profit or that of [their] members."

In deciding what constitutes a corporation organized for its own profit or that of its members, the court relied upon several familiar rules of statutory construction: that the Commission has only such jurisdiction as Con-

gress conferred upon it by statute; that when the Commission's jurisdiction is challenged, it has the burden of establishing its jurisdiction; that the legislative intent should be ascertained from the language of the statute itself when it is clear and plain; that the plain, obvious, rational meaning of a statute is to be preferred to any curious, narrow, hidden sense; and that common words are to be taken in their ordinary significance in the absence of any evidence of a contrary intent (405 F.2d at 1015). The court emphasized the fact that the Sherman and Clayton Acts apply to *all* corporations, while the Federal Trade Commission Act is limited in application to profit-making corporations (405 F.2d at 1018).

Relying upon these principles, the court concluded that the test for jurisdiction is whether the non-stock corporation "engaged in business for *profit* within the traditional and generally accepted meaning of the word" (405 F.2d at 1017) (emphasis in original). The court stated:

> "According to a generally accepted definition 'profit' means gain from business or investment over and above expenditures, or gain made on business or investment when both receipts or payments are taken into account." (405 F.2d at 1017).

To help define the word "profit," the court quoted the following language from the Supreme Court of Wisconsin:

> "[w]hether dividends or other pecuniary benefits are contemplated to be paid to its members is generally the test to be applied to determine whether a given corporation is organized for profit." (405 F.2d at 1017, *quoting Associated Hospital Service, Inc.* v. *City of Milwaukee,* 13 Wis.2d 447, 109 N.W.2d 271 (1961)).

The language of the statute is manifest that in order for a corporation to be subject to Federal Trade Commission jurisdiction, profit-making must be its primary purpose. Congress gave the Commission jurisdiction over corporations *"organized"* for profit; it did not confer jurisdiction over corporations *which engage in any profit-making activity.* The court in *Blood Bank* acknowledged this fact when it paraphrased with approval language from *Southernland* v. *Decimo Club, Inc.*, 16 Del. Ch. 183, 142 A. 786, 790 (1928) as follows:

> "[E]ngaging in business and making profits must be more than a subordinate or mere incidental characteristic of a corporation's existence for it to be considered one operated for profit." (405 F.2d at 1017).

The fact that profit-making must be more than an incidental aspect of a corporation to make it one organized for profit becomes more clear when one examines the facts in *Blood Bank.* The corporations themselves were non-profit organizations, but some of the hospital members were in fact proprietary (405 F.2d at 1020 n.16). Moreover, the initial decision of the Hearing Examiner made it quite clear that the non-profit corporations did confer economic benefits upon their members because he found as facts the following:

> "Although it is very clear that neither Area Hospital Association nor Community ever utilized any funds received for distribution to members or for that matter to officers and directors, *both organizations performed very valuable services for those affiliated with it. It was thus in the broadest sense exceedingly profitable for the doctors and for the hospitals to receive the services which were so well performed by both of these organizations.* In connection with bloodbanking, Area Hospital Association

> was particularly useful to the hospital administrators in working with the Jackson County Medical Society and the Society of Pathologists, among others, to provide a reliable source of blood and to relieve the hospitals of the onerous task of securing blood donors and making elaborate borrowing arrangements for rare blood. The association was the forum which resolved the questions raised by the pathologists and it was the medium through which a portion at least of the corporate membership of Community was selected." (*Community Blood Bank of Kansas City Area, Inc.*, 70 F.T.C. 728, 767 (1966) (emphasis added)).

Obviously, the requirements of Sections 4 and 5 of the Act are not satisfied by the fact that an organization may benefit its members in the broad sense of the term "profits."

The court in *Blood Bank* recognized that the mere fact that a corporation is in form non-profit does not prove that it is in fact a non-profit corporation. The Commission does have authority "to regulate so-called nonprofit corporations, associations and all other entities if they are in fact profit-making enterprises" (405 F.2d at 1018). Therefore, *Blood Bank* permits an examination into the actual operation of the organization in order to determine whether it is a sham non-profit corporation *which actually is organized for profit*. However, this is by definition a limited inquiry, *i.e.*, was the non-profit corporation in fact "organized" for profit (405 F.2d at 1019).

The Second Circuit, in the instant matter, in direct conflict with the decision in *Blood Bank*, stated that:

> "The business aspects of the activities of the petitioners [the American Medical Association] fall within the scope of the Federal Trade Commission Act *even if they are considered secondary to the*

> *charitable and social aspects of their work.*" (*American Medical Ass'n* v. *Federal Trade Comm'n*, 1980-2 Trade Cas. ¶63,569, 77,026 (2d Cir. 1980) (emphasis added)).

This statement cannot be reconciled with the holding in *Blood Bank.*

Judge Mansfield's dissent in *American Medical Ass'n*, although it did not change the result, does introduce a third test for jurisdiction and surely emphasizes the fact that the time has long come for this Court to determine this jurisdictional question. Judge Mansfield stated:

> "However, I cannot agree with the majority that such jurisdiction exists whenever the business interests of associations are 'secondary to the charitable and social aspects of their work,' which would confer jurisdiction whenever a non-profit organization serves *any* business interest." (1980-2 Trade Cas. at 77,031 (emphasis in original)).

Accordingly, the dissent introduces a substantiality test for determining Federal Trade Commission jurisdiction.

Clearly the tests, enunciated by the Eighth Circuit in *Blood Bank*, by the Second Circuit, and by Judge Mansfield's dissent in the instant matter, as to whether or not a non-profit professional association is subject to Federal Trade Commission jurisdiction are directly conflicting.[3] Accordingly, this Court should grant the Petition For A Writ Of Certiorari in order to resolve this conflict and

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[3] In the ADA case the Administrative Law Judge in denying ADA's Motion For Summary Decision refused to adopt any test for jurisdiction. *See, American Dental Ass'n*, [1976-1979 Transfer Binder] Trade Reg. Rep. ¶21,382 (January 18, 1978).

establish a single jurisdictional test under the Federal Trade Commission Act.

B. The Jurisdiction of The Federal Trade Commission Over Not-For-Profit Corporations Raises a Significant Question Of Federal Law Which Has Not Been Decided By This Court.

There is no legislative history suggesting that Congress intended the Federal Trade Commission to have jurisdiction over not-for-profit professional associations. *See,* H.R. Rep. No. 553, 63d Cong., 2d Sess. (1914); S. Rep. No. 597, 63d Cong., 2d Sess. (1914); H. R. Rep. No. 1142, 63d Cong., 2d Sess. (1914). Both the original Senate and House of Representatives versions of the bill to create the Commission were designed specifically to give the Commission jurisdiction over purely commercial corporations. The House bill provided:

> "'Corporation' means a body incorporated under law, and also joint-stock associations and all other associations having shares of capital or capital stock or organized to carry on business with a view to profit." (H.R. Rep. No. 1142, 63d Cong., 2d Sess. 11 (1914)).

The Senate bill similarly provided:

> "The term 'corporation' or 'corporations' shall include joint-stock associations and all other associations having shares of capital or capital stock, organized to carry on business for profit." (H.R. Rep. No. 1142, 63d Cong., 2d Sess. 14 (1914)).

Prior to the eventual passage of the Act, there was concern that the definition of "corporation" in neither the House nor the Senate version was broad enough to extend the Federal Trade Commission's jurisdiction to trade associations of manufacturers or dealers several of

which were organized as non-profit corporations. This opinion was voiced by Joseph E. Davies, Commissioner of the Bureau of Corporations, in an August 8, 1914 letter to Senator Newland, Chairman of the Senate Committee on Interstate Commerce and sponsor of the Senate bill. *See, Community Blood Bank of Kansas City Area, Inc.*, 70 F.T.C. 728, 905-906 (1966), *rev'd*, 405 F.2d 1011 (8th Cir. 1969). Commissioner Davies' recommended changes were eventually adopted by the Conference Committee and incorporated into the Act as the law presently appears. (H.R. Rep. No. 1142, 63d Cong., 2d Sess. 13 (1914)). Therefore, it is clear that the drafters of the Federal Trade Commission Act intended the statute specifically to reach only trade associations,[4] beyond for-profit corporations.

The legislative history does not support the theory that the language of Section 4 of the Federal Trade

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[4] Commentators support this view:
"The Eighth Circuit has held the Commission does not have jurisdiction over 'all non-profit corporations regardless of their purposes and activities.' Community Blood Bank, Inc. v. FTC, 405 F.2d 1011 (8th Cir. 1969). The Court stated jurisdiction was to be determined 'on an *ad hoc* basis.' The Commission can 'proceed against any legal entity without shares of capital *which engages in business for profit* within the traditional meaning of that language.' Id. at 1018 (Emphasis supplied by the court). Accordingly, the FTC has exercised jurisdiction over non-profit corporations that were mere shells organized and controlled by individual respondents for their own benefit. Ohio Christian College, [1970-1973 Transfer Binder] Trade Reg. Rep. ¶ 20,017 (FTC 1972)." ABA Antitrust Law Developments 167 n.20 (1975); *see generally*, Rosoff, *Antitrust Laws and the Health Care Industry: New Warriors into an Old Battle*, 23 St. Louis U.L.J. 446 (1979).

Commission Act—"organized to carry on business for its own profit or that of its members"—was intended to encompass non-profit professional associations. Accordingly, Congress is presumed to have used the critical word "profit" in its usual and well-settled sense. *United States* v. *Stewart*, 311 U.S. 60, 63 (1940); *Old Colony R.R. Co.* v. *Commissioner*, 284 U.S. 552 (1932). As this Court has repeatedly stated:

> "A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning . . . . Therefore, we look to the ordinary meaning of the term 'bribery' at the time Congress enacted the statute in 1961." (*Perrin* v. *United States*, 444 U.S. 37, 42 (1979)).

Thus, the term "profit" as employed in the Federal Trade Commission Act is to be interpreted as taking its meaning as it was commonly understood in 1914.

The absence of any contrary direction in either the Act itself or the legislative history can be taken as Congress' satisfaction with and adoption of the then widely accepted definition of "profit" as related to not-for-profit corporations. *Morissette* v. *United States*, 342 U.S. 246, 263 (1952). *See also*, *Burns* v. *Alcala*, 420 U.S. 575, 580-581 (1975).

"Profit" has had a well known and widely accepted meaning in the law and it is this meaning that Congress is presumed to have intended in the Federal Trade Commission Act. The traditional definition of "profit" within the context of not-for-profit corporations is that in order for a corporation to be one organized for profit, there must be dividends or other pecuniary benefits contemplated to be paid to its members. This definition is uni-

versally accepted by the courts throughout the United States in determining whether entities are not-for-profit. *See, e.g., Read* v. *Tidewater Coal Exchange, Inc.*, 13 Del. Ch. 195, 116 A. 898 (1922) (defendant held to be not-for-profit corporation even though there was financial betterment for its members); *People* v. *Universal Service Ass'n*, 365 Ill. 542 (1937) (the Illinois Supreme Court held that defendant was a for-profit corporation because dividends were in fact paid even though they were designated as something other than dividends); *State* v. *Lally*, 59 Wash.2d 849, 370 P.2d 971 (1962) (the Washington Supreme Court held that a corporation is not-for-profit even though its activities or enterprises may be conducted for gain, profit or net income so long as it is used for its stated purpose and there is no pecuniary gain to the incorporators or members nor any distribution of income or profits). *Accord, Debs Memorial Radio Fund, Inc.* v. *Commissioner*, 148 F.2d 948 (2d Cir. 1945).

Congress clearly intended the jurisdiction of the Federal Trade Commission Act to reach only traditional for-profit corporations and trade associations. Although this Court has held, without much discussion, that sham not-for-profit corporations are trade associations subject to the Federal Trade Commission's authority, the rationale for that position is found in both the legislative intent as discussed above and in logic.

The dissenting opinion of Commissioner Elman in the *Blood Bank* case,[5] which was cited with approval by the Eighth Circuit,[6] makes the case for this position as follows:

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[5] *Community Blood Bank of Kansas City Area, Inc.*, 70 F.T.C. 728, 948 (1966).

[6] 405 F.2d at 1019.

"In a number of cases, it is true, the Commission and the courts have refused to recognize any exemption from the Federal Trade Commission Act for nonprofit corporations employed by commercial enterprises as a medium or instrumentality to commit unfair practices. But, so far as I know, the only such corporations have been trade associations. Trade associations, which bring together firms having common business concerns, have often played a central role in boycotts, price-fixing conspiracies, and other unlawful conduct involving concert of action. *In such a case, piercing the nonprofit corporate veil and recognizing the trade association for what it is—a device by which individual profit-making concerns, for private gain, seek to restrain competition—does no violence to the Congressional design embodied in Sections 5(a)(6) and 4 of the Federal Trade Commission Act; failure to pierce the veil, indeed, would elevate form over substance to an unreasonable degree, and lay the path to evasion of the Act wide open.*" (70 F.T.C. at 949 (emphasis added; citations omitted)).

The very language Commissioner Elman employs, namely, "piercing the nonprofit corporate veil," indicates that Commissioner Elman squares the so-called sham not-for-profit cases on the ground that the not-for-profit exemption should not be used by commercial entities as a way of escaping the reach of the Commission.

Although the Federal Trade Commission will take the position in this Court that it has jurisdiction over traditional not-for-profit corporations, recent positions taken by the Commission lead to the conclusion that the Federal Trade Commission does not have such jurisdiction.

In 1977, the Federal Trade Commission advocated an amendment to the Federal Trade Commission Act which would have granted the Commission jurisdiction over

non-profit corporations. *See, Proposed Federal Trade Commission Amendments of 1977 and Oversight: Hearings on H.R. 3816 Before the Subcomm. on Consumer Protection and Finance of the House Comm. on Interstate and Foreign Commerce,* 95th Cong., 1st Sess. (1977) [hereinafter *1977 Hearings*]. As stated by Mr. Calvin J. Collier, then Chairman of the Federal Trade Commission:

> "The bill [H.R. 3816] would make several changes in the jurisdiction of the Commission. In particular, it would: (1) Broaden the reach of the FTC Act by redefining 'corporation' to include nonprofit corporations . . . . We strongly support each of these changes." (*1977 Hearings* at 69).

Chairman Collier observed that the amendment was made necessary by the restrictive definition of "corporation" contained in Section 4 of the Federal Trade Commission Act:

> "The existing definition of 'corporation' has hindered Commission challenges to otherwise unlawful behavior by certain nonprofit corporations. In some instances, anticompetitive or deceptive practices have escaped altogether; in others, the Commission has been able to reach the activities only after a time-consuming trial to prove that the respondent, whatever its nominal form, was in reality a conduit for commercial interests."[7] (*1977 Hearings* at 69).

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[7] Chairman Collier's remarks echo those of commentators regarding the Section 4 definitional barrier to Federal Trade Commission jurisdiction over professional associations in the health care field:

> "Since many entities operating in the health industry are organized on a nonprofit basis, substantial areas of potential antitrust activity are closed to action by the FTC." (Rosoff, *supra* note 4, at 452).

Chairman Collier further reasoned that the statutory change was mandated by the decision in *Blood Bank*, stating:

> "After *Community Blood Bank*, the Commission efforts to reach nonprofit corporations engaged in deceptive or anticompetitive practices have succeeded only after the often time-consuming proof that the respondent, whatever its nominal form, was in reality a conduit for essentially commercial interests." (*1977 Hearings* at 82).

Finally, Chairman Collier testified that the problems which the Federal Trade Commission has encountered have arisen when the Commission challenged activities "of nonprofit corporations of a less traditionally commercial character" (*1977 Hearings* at 82). In other words, even according to then Chairman Collier, Federal Trade Commission jurisdiction may be absent when the Commission does not focus its attention on corporations organized for profit in the ordinary and traditional sense. This result appears to be precisely what Congress intended when it granted the Commission more limited jurisdiction than granted under the Sherman and Clayton Acts. Indeed, Mr. Peter Kinzler, counsel to the subcommittee, suggested that even the Commission's approach in *Ohio Christian*[8] may have been improper under *Blood Bank*:

> "Ohio Christian College did not go to the courts. There is nothing to indicate the courts would have upheld the FTC on this. In the *Community Blood Bank* case, which was a very egregious situation, the FTC was not upheld." (*1977 Hearings* at 549).

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[8] For a brief description of *Ohio Christian* see note 4 *supra*.

The Committee on Interstate and Foreign Commerce of the House of Representatives, after hearing testimony on the amendment, deleted the proposed provision in the bill which would have closed the gap in the Commission's jurisdiction, noting the absence of jurisdiction under the current wording of Section 4 of the Federal Trade Commission Act. (H.R. Rep. No. 339, 95th Cong., 1st Sess. 120 (1977).

Congress' position on Federal Trade Commission jurisdiction was reiterated by Mr. Alfred F. Dougherty, Jr., former Director of the Commission's Bureau of Competition, in remarks made before a December 13, 1977 antitrust seminar sponsored by the National Health Lawyers Association in Washington, D.C. *See,* 312 Trade Reg. Rep. 2 (December 19, 1977). In statements that again demonstrate the serious question that exists wth respect to the Federal Trade Commission's jurisdiction over nonprofit professional associations and the need for this Court to resolve the issue presented, Mr. Dougherty discussed the non-profit corporation exemption in the context of the Commission's activities in the health care field. The following summary of his remarks is contained in Trade Regulation Reports:

> "Two statutory law problems presently impede FTC action. One is that the FTC Act lets the agency move only against for-profit corporations; since there are a number of nonprofit corporations in the field having substantial effects on competition in health care markets, the agency has been hampered. Mr. Dougherty noted that when the Commission proposed elimination of the provision to Congress last year, it did not focus on relationships between nonprofit corporations and competition in health care markets: 'I can assure you that the next time the matter is raised with Congress, these issues will be fully addressed.'" (312 Trade Reg. Rep. at 3-4).

The position taken by the American Dental Association herein is not an argument for any exemption from the antitrust laws. After the decision by this Court in *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975), it is clear that certain activities of professional associations are subject to antitrust scrutiny. The issue here, however, is whether Congress intended the Federal Trade Commission's jurisdiction to reach traditional not-for-profit corporations. It is clear beyond cavil that Congress did not so intend.*

* When a court of appeals has adopted a clearly erroneous interpretation of the law, this Court has utilized the device of a summary reversal which we respectfully urge in this action. *See, e.g., Catalano, Inc.* v. *Target Sales, Inc.*, 446 U.S. 643 (1980).

CONCLUSION

Because a clear conflict exists among the circuit courts of appeals with respect to the interpretation of Section 4 of the Federal Trade Commission Act and because of the significance of the jurisdictional issue presented in this case, we respectfully request that this Court grant the Joint Petition For A Writ Of Certiorari.

Respectfully submitted,

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April 8, 1981

APPENDIX

APPENDIX

In The

SUPREME COURT OF THE UNITED STATES

No.

AMERICAN MEDICAL ASSOCIATION, CONNECTICUT STATE MEDICAL SOCIETY, and NEW HAVEN COUNTY MEDICAL ASSOCIATION, INC.,

Appellants,

v.

FEDERAL TRADE COMMISSION,

Appellee.

CONSENT

On behalf of the American Medical Association, the undersigned hereby consents, pursuant to Rule 36 of the Rules of the Supreme Court of the United States, to the filing of a Brief Amicus Curiae on behalf of the American Dental Association in the above-captioned matter.

SIDLEY & AUSTIN
On Behalf of the American Medical Association

DATED: March 24, 1981

In The

SUPREME COURT OF THE UNITED STATES

No.

AMERICAN MEDICAL ASSOCIATION, CONNECTICUT STATE MEDICAL SOCIETY, and NEW HAVEN COUNTY MEDICAL ASSOCIATION, INC.,

Appellants,

v.

FEDERAL TRADE COMMISSION,

Appellee.

CONSENT

On behalf of the Connecticut State Medical Society and the New Haven County Medical Association, Inc., the undersigned hereby consents, pursuant to Rule 36 of the Rules of the Supreme Court of the United States, to the filing of a Brief Amicus Curiae on behalf of the American Dental Association in the above-captioned matter.

WIGGIN & DANA
On Behalf of the Connecticut State Medical Society and the New Haven County Medical Association, Inc.

Dated: March 30, 1981

U.S. Department of Justice
Office of the Solicitor General
Washington, D.C. 20530
March 25, 1981

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Re: American Medical Association v. FTC,
1980-2 Trade Cases ¶63,569 (2d Cir. 1980)

Dear Mr. Sfikas:

As requested in your letter of March 23, 1981, I hereby consent to the filing of a brief *amicus curiae* on behalf of the American Dental Association.

Sincerely yours,
Wade H. McCree, Jr.
Solicitor General

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

In the Matter of
AMERICAN DENTAL ASSOCIATION,
a corporation,

INDIANA DENTAL ASSOCIATION,
a corporation,

INDIANAPOLIS DISTRICT DENTAL SOCIETY,
a corporation

VIRGINIA DENTAL ASSOCIATION,
a corporation, and

NORTHERN VIRGINIA DENTAL SOCIETY,
a corporation.

DOCKET NO. 9093

AGREEMENT CONTAINING CONSENT
ORDER TO CEASE AND DESIST

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IT IS ORDERED that:

(A) On entry of a final adjudicated order in FTC Docket No. 9064, the Commission will issue an order ("*ADA* order") against respondents in this proceeding which will consist of the provisions of the FTC Docket No. 9064 final adjudicated order, conformed to make such provisions fully applicable to respondents herein, consistent with Section I(C) of this Order. Such conforming modifications will include, for purposes of illustration, but not be limited to, substituting the names of respondents and their ethical codes and publications for the names of the FTC Docket No. 9064 respondents and their ethical codes and publications, respectively, and substituting the words "dental" for "medical", "dentists" for "physicians", and "dentists' services" for "physicians' services". Respondents shall be bound by such *ADA*

order and shall have no right to seek judicial review or otherwise challenge the validity of it unless it fails to conform substantially to the final adjudicated order in FTC Docket No. 9064, consistent with Section I(C) of this Order, provided however:

(B) In the event that the Commission issues a decision and order based on a consent agreement against the American Medical Association in FTC Docket No. 9064, the instant case shall immediately be reopened and returned to adjudicative status.

(C) No provisions in the final adjudicated order in FTC Docket No. 9064 which relate directly to physicians' contractual arrangements for the sale or distribution of their professional services or to the growth, development or operations of any prepaid health care delivery plan or of any other organization which offers physicians' services to the public shall be applicable to respondents, except to the extent that such provisions relate to advertising or solicitation of patients or business.

(D) In the event that the final adjudicated order in FTC Docket No. 9064 dismisses the complaint on the merits or for lack of jurisdiction, the Commission shall dismiss the complaint in this proceeding.

(E) For the purpose of clarifying Section I(A) of this Order, respondents shall not be bound by any order entered pursuant to Section I(A) of this Order based on an order of the Commission or a reviewing court which may be entered in FTC Docket No. 9064 unless and until such Docket No. 9064 order becomes a final adjudicated order.

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